IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	
CUMMINS UTILITY, L.P.	§	CASE NO. 01-47558-DML-11
	§	
Debtor.	§	Chapter 11

MEMORANDUM SUPPLEMENT TO ORDERS AWARDING INTERIM COMPENSATION

On March 12, 2002, this Court heard initial interim applications for compensation and reimbursement of expenses (the "Applications" or, individually,"Application") filed herein by Haynes & Boone, LLP ("H&B"), counsel to the Debtor, Baker & McKenzie ("B&M"), counsel to the Official Creditors' Committee ("the Committee") and Lain, Faulkner & Co, P.C. ("LF"), accountants to the Committee.[1] The Court had fully reviewed each Application. Though the Court had concerns about the Applications, it awarded the fees as applied for, based on the understanding of the parties that the award could be revisited when the Court considered final applications for compensation and reimbursement. The Court also advised the parties that it would spell out its concerns in greater detail in memorandum form. This Memorandum is intended to fulfill that purpose as well as to offer guidance as to this judge's views on compensation in large chapter 11 cases.[2]

[1]The Court also considered and separately ruled upon the Final Application of Development Specialists, Inc., financial advisor to Debtor.

[2]The Court has provided similar guidance for Chapter 13 cases in its Memorandum Order in *In re Stow, et al*. Case No. 01-40065-DML-13**.** The Court retains its ability to rectify any errors made in the interim grant of compensation here in conformance to allowing further submissions in *Stow*.

I. Overview

Each of the Applications in the instant case complies in most respects with applicable case law, statute, rules and the guidelines promulgated by the Office of the United States trustee. While there are descriptions of services for given time entries which are arguably inadequate, and instances of "clumping," the Court does not consider that these failings would warrant any adjustment to compensation.

The Court, however, has difficulty evaluating whether the charges reflected in the Applications translate into fair value for Debtor's estate and its creditors. This is partly the fault of the guidelines imposed on professionals. Section 330(a)(3) and (4) of the Bankruptcy Code and binding precedent such as *In re First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir. 1997), *cert. denied*, 431 U.S. 901 (1977) and *Johnson v. Georgia Highway Express, Inc.,* 488 F. 2d 714 (5th Cir. 1974) require that professionals deal with specific factors in a fee application (some of which have little application in bankruptcy or in a given case). The United States trustee's guidelines deal largely with the form and formatting of time entries. The result, while no doubt intended to ease the bankruptcy court's burden in analyzing fee applications, is, for this judge at least, applications that encourage a focus on minutiae as opposed to the fair value of a professional's services.

In the instant case, the narratives and time entries offered in the Applications, however consistent with applicable requirements, sometimes fail to alert the Court to why a given task required extensive time while another task was disposed of easily. In addressing factors, professionals regularly use boilerplate (e.g., in describing the desirability of the case, reputation and experience of counsel or consistency with customary fees). Focus thus must be on time entries. Yet even the most descriptive time entry often will not adequately inform the Court as

to the scope of the task addressed. An entry describing research, for example, may well understate the intricacies of the questions to which the billing lawyer was seeking answers. The judge's own experience may suggest that less time should have been required to complete the research as described – though if the judge better understood the problem faced he would appreciate the need for the time spent.[3]

This difficulty is exacerbated by the breakdown (pursuant to applicable guidelines) of time by task area. One professional may record time under one heading while another chooses a different heading – though both are working toward a common product. For example one lawyer may consider his or her work "lien review" while another sees a parallel effort as falling under "avoidance actions." In the instant case, the Court found entries dealing with reclamation claims in three different task categories in the H&B Application. During the March 12 hearing H&B advised the Court that there was overlap between "reclamation" research and "consignment" research as well.

In the H&B Application approximately $10,000 of time is shown devoted to research of reclamation issues. Reclamation law is not a particularly complex area in most situations (the figure given above does not include any time shown as spent on consignment issues or on the system devised by the parties for dealing with reclamation claims).

The Court, without more explanation might therefore be inclined to reduce the fees sought under this heading.[4]

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[3]The Court is conscious of the need to tailor some time entries to preserve confidentiality. There are ways to address this problem. A more informative narrative may even point out the need to maintain confidentiality and so satisfy concerns about recorded time.

[4]The Court's approach is actually holistic: if the fees sought are commensurate with the extent and quality of the services as a whole, the Court is not inclined to criticize charges for individual tasks. In the instant case, however, most of the "action" occurred outside of the courtroom, the complete record of the case (which the Court has reviewed) does not inform the Court much about the work done by the professionals, and as discussed, *infra*, time entries considered in conjunction with work product visible to the Court raise enough questions that further

The explanation may lie in one of two areas. Either the time in question was not adequately policed or reviewed – something the Court has no reason to believe, or the narrative portion of H&B's Application should have described the peculiar problems faced that required an extraordinary research effort. The Court does not mean to be critical: the Applications are surely sufficient by existing standards. To be satisfied it has properly performed its duty under 11 U.S.C. § 330(a) to review the Applications, though, the Court believes it must know more.

II. Large Firms in Complex Cases

Large, complicated Chapter 11 cases typically call for the retention of large law firms with a broad range of expertise. Large law firms, especially like H&B and B&M, both of which maintain many offices and conduct a practice of national scope, tend to charge hourly rates for their personnel which are at the high end of the spectrum. In the instant case, for example, H&B used paralegals who billed at rates ranging from $130 per hour to $170 per hour. There are competent firms that appear before this Court that bill junior partners at similar rates.

Moreover, large firms pay high salaries to young lawyers. This presumably attracts the best talent to the firms. The temptation is great to earn a profit from the work of personnel even during initial, learning stages of employment. At least in bankruptcy cases, however, excessive time spent by a neophyte in research or preparation of documents is not a proper charge. It is up to supervising attorneys to ensure such learning and training time is not billed to a bankruptcy estate.

In bankruptcy cases, the Court is instructed to consider (1) customary charges in the community for the work involved (*First Colonial*, 544 F.2d at 1298); (2) "customary

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information is required. That said, the Court is generally aware of the progress made in this case in a short period of time. While that alone may justify some duplication of effort and excessive time spent exploring a "blind alley," without more explanation it is not sufficient for more than speculation on the Court's part that the professionals' services provided fair value to the estate and its creditors.

compensation charged by comparably skilled practitioners in cases other than cases under" Title 11 (11 U.S.C. § 330(a)(3)(E)); and (3) the "lodestar" produced by multiplying time spent by hourly rates (11 U.S.C. § 330(a)(3)(A)[5] and (B); *see League of United Latin Am. Citizens (LULAC) v. Roscoe Indep. Sch. Dist.*, 119 F. 3d 1228, 1232 (5th Cir. 1997)). The second of these criteria is extremely difficult to apply. Comparing the out-of-court dismemberment and sale of a corporation to its sale in pieces in a going concern configuration under the supervision of the bankruptcy court [6] is to liken apples to oranges. The first test is little better. Each Chapter 11 case is unique, and the cost of achieving the desired result in one case is rarely a fair indicator of what will be required in the way of time and effort in the next.

This leaves both practitioners and the Court with the lodestar as the objective measure of the value of services rendered. But the judge must then adjust the lodestar to account for other factors which run to the reasonableness of the fees, the benefits achieved, the skill required and the complexity of the case. As noted in Section I of this Memorandum, bankruptcy courts are often called upon to make this assessment with limited or inadequate data and only the vaguest idea of the particular difficulties encountered by the professional. The result can be uncritical acceptance of the lodestar, nitpicking of individual time entries or uncalled for reductions in compensation.

The Court wishes to be confident it is properly performing its responsibilities. Thus, the Court notes that H&B's hourly charges are materially higher than B&M's and many other of the firms that practice before it. The Court is not prepared to accept this incremental difference simply by ascribing to H&B a higher quality of professional.[7] The Fort Worth – Dallas bar is

[5]Of the two subsection "(A)'s", this refers to the second.

[6]The situation in this case.

[7]The exception is H&B's Mr. Phelan, but his time in this case is limited.

replete with fine bankruptcy attorneys;[8] only by way of example, the Court cannot rate H&B's Mr. Penn above B&M's Mr. Hale in terms of experience or skill (each has practiced for 20 years, yet in the instant case Mr. Penn charged up to 18% more than Mr. Hale). Certainly the Court can not conclude that junior associates at H&B are more skilled and experienced than their peers at other firms.

This would suggest (under the customary fees criterion) that the H&B lodestar should be reduced. But it is not that simple. First, as noted, *supra*, there is the issue of whether the senior attorney responsible for the case (here Mr. Penn) has "policed" the timekeeping that led to the lodestar. As no doubt is done with any major client of H&B, the Court assumes that Mr. Penn reviewed carefully the time to be charged in this case. If time spent on a given task appeared excessive – whether due to inefficiency (excusable or not) on the part of the timekeeper or because addressing the task proved uneconomic – the Court would expect Mr. Penn has reduced the time accordingly.

Second, H&B has been engaged in the practice of bankruptcy law on a national scale for almost three decades. In that time the firm has accumulated experience that is embodied in written research and forms which should give the H&B lawyer a head start over his counterparts at other firms. This, together with the efficient use of professionals, is how H&B may justify a lodestar – and thus the Application – based on higher than typical rates.[9]

The Court is more than ready to accept as reasonable and sufficiently beneficial to the Debtor's estate the lodestar amount reflected in H&B's Application. The narrative provided, however, must clarify that timekeepers were policed, that H&B's extensive experience was used

[8]This Memorandum deals with local firms and is not meant to suggest that out-of-town professionals are expected to bill at local rates.

[9]Put another way, this judge is amenable to <u>any</u> hourly rate so long as the professional's work product is generally of a value commensurate with the cost.

to bring efficiency to the case and that time consuming tasks warranted their cost. The Court hopes that both H&B and B&M in their final fee applications will expand the narrative portion of their applications to call to the Court's attention evidence of efficiency and careful review of time charged.

III. Some Specific Questions

After the preceding discussion, it may be useful for the professionals involved to have some sense of what specifically troubled the Court about the Applications. The following questions are posed as examples, not as a complete listing of issues the Court would like addressed. Based on the examples, the Court is confident H&B, B&M and LF will be able to judge what further explanation[10] is required in the narrative in future requests for compensation or what adjustments might be appropriate to the Applications.

1. <u>H&B:</u>

a. The Court notes that Mr. Penn personally undertook most scheduling of hearings as well as response to creditor e-mail inquiries. The Court questions why those tasks might not have been performed more inexpensively by paralegals (or even by non-professionals). Even paralegal or secretarial screening the 4000 e-mails Mr. Penn stated he had received regarding the case might have added to the efficiency of H&B's representation.

b. The reclamation and consignment issues were mentioned, *supra*. It strikes the Court that the former, at least, probably has previously been encountered by H&B. Before final allowance the Court therefore would like greater comfort that the firm's experience was utilized to minimize the cost of research in these areas. Similarly the time spent on researching

[10]Conclusory statements of the sort often used in responding to "factors" are not what the Court has in mind.

applicability of the automatic stay to post-petition termination of contracts with a debtor seemed high to the Court given the rather obvious answer to the question posed.

c. H&B charges $70 per hour for a non-professional to do filing and similar tasks. This charge requires justification.

d. The asset purchase agreement(s) absorbed over $12,000 of time. "First Day" pleadings were costly as were many other pleadings (e.g., the Omnibus Rejection Motions and responses to Bankruptcy Code § 365(d)(2) motions). The Court has reviewed the asset purchase agreement and these pleadings. They appear to the Court unexceptional and either short or likely to be based on forms regularly used. The time required for their preparation, including review and revision, merits more explanation.

2. B&M:

B&M clearly policed its time, not charging for most paralegal work and adjusting fees for travel to Fort Worth. However, the Court has several questions about time entries.

a. B&M appears to have charged the estate for clearing a bank conflict. While this is a minor matter, the steps leading to a professional's employment (other than preparation of pleadings) are not ordinarily chargeable to an estate.

b. There are repeated entries reflecting multiple items of correspondence by Ms. Jain on the same day to the same person on the same subject (see, e.g., entries for 11/19/01, 11/27/01, 12/04/01, 12/10/01, 12/17/01, 12/26/01 and 1/11/02). While the Court suspects this may be due to communication by e-mail, it should be explained as such.

c. The Court would appreciate assurance that B&M and H&B minimized duplication of effort on claims analysis, reclamation research and consignment research.

d. Mr. Hale shows a number of conferences with Ms. Jain for which Ms. Jain has no corresponding entry (though Ms. Jain records a conference on 12/3/01 which Mr. Hale shows on 12/4/01). It may be that only one attorney is billing for each conference, but this should be stated if it is so.

e. The time spent reviewing lien validity appears high, especially given the ground work done by H&B.

2. LF:

The Court has no questions specific to LF.

IV. Conclusion

This judge holds the bankruptcy lawyers at H&B and B&M (and their colleagues throughout the Fort Worth-Dallas area) in high regard. That makes the job of passing on their fees all the more difficult.

Nevertheless, the Bankruptcy Code and the case law impose upon the bankruptcy judge the requirement of carefully reviewing any fee request presented to it. While the judge, on a personal level, may undertake this work rooting for the professional whose fees are at issue, the job must still be done thoroughly, objectively and fairly.

In this Memorandum the Court does not intend to rebuke any professional. Rather it hopes to give professionals a clear idea of how it views its role in payment of compensation. It is a role the Court takes seriously and will perform with the same diligence a practicing lawyer employs in the representation of a client.

In conclusion, this Memorandum is issued in the hope – expectation – that it will result in compensation being paid in the amount applied for in this and future cases. However, that result

is dependent on the Court's confidence that the estate has received services of a value equal to the fees sought.

SIGNED this _____ day of March, 2002.

HONORABLE D. MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE